

BRUCE S. GELBER  
Chief  
Environment & Natural Resources Division  
United States Department of Justice  
Washington, D.C. 20530

ANGELA O'CONNELL  
Trial Attorney  
Environmental Enforcement Section  
United States Department of Justice  
301 Howard Street, Suite 870  
San Francisco, California 94105  
(415) 744-6485

PAUL CHARLTON  
United States Attorney  
for the District of Arizona  
UNITED STATES ATTORNEY'S OFFICE  
Two Renaissance Square  
40 North Central Ave.  
Suite 1200  
Phoenix, Arizona 85004-4408  
(602)514-7500

Attorneys for Plaintiff, United States of America

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

APACHE NITROGEN PRODUCTS, INC.,

Defendant.

CIVIL NO.

CONSENT DECREE

## TABLE OF CONTENTS

I.	JURISDICTION AND VENUE .....	Page -2-
II.	APPLICABILITY .....	Page -3-
III.	DEFINITIONS .....	Page -3-
IV.	CIVIL PENALTY .....	Page -3-
V.	INJUNCTIVE RELIEF .....	Page -4-
VI.	STIPULATED PENALTIES .....	Page -6-
VII.	DISPUTE RESOLUTION .....	Page -9-
VIII.	FORM OF NOTICE .....	Page -11-
IX.	NOT A PERMIT .....	Page -13-
X.	FAILURE OF COMPLIANCE .....	Page -13-
XI.	NONWAIVER PROVISIONS .....	Page -13-
XII.	MISCELLANEOUS .....	Page -14-
XIII.	CONTINUING JURISDICTION OF THE COURT .....	Page -15-
XIV.	TERMINATION .....	Page -15-

## CONSENT DECREE

WHEREAS, concurrently with the lodging of this Consent Decree, Plaintiff United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), is filing a Complaint in the United States District Court for the District of Arizona against Defendant, Apache Nitrogen Products, Inc. ("Apache Nitrogen").

WHEREAS, the Complaint alleges that on at least 40 occasions between 1999 and 2000, Apache Nitrogen operated its AOP-3 and AOP-4 nitrogen products manufacturing plants ("Facility") located near St. David, Arizona, in violation of the requirements of Section 113(b)(1) of the Clean Air Act, 42 U.S.C. § 7413(b); and 40 C.F.R. § 60.11(d) to maintain and operate its facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions;

WHEREAS, the parties agree that settlement of this action is in the public interest and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this action and avoiding protracted litigation costs and expenses;

THEREFORE, based upon the pleadings, without adjudication of any issue of fact or law, and without any finding or admission of facts or liability against or by Apache Nitrogen;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

### I. JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to Section 3113(b) of the Clean Air Act. 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1331, 1345, and 1355. This Court also has personal jurisdiction over Apache Nitrogen. Venue is proper in this District pursuant to Section 28 U.S.C. § 1391(b) and 1395, and Section 113(b) of the Clean Air Act. 42 U.S.C. § 7413(b), because the violations alleged in the Complaint occurred at Apache Nitrogen's manufacturing plant in St. David, Arizona, which is within this District. For purposes of this Consent Decree, Apache Nitrogen waives all objections to jurisdiction and venue.

## II. APPLICABILITY

1. The provisions of this Consent Decree shall apply to and be binding upon Apache Nitrogen, its officers, directors, agents, servants, employees, successors, contractors, and assigns, and upon the United States.

## III. DEFINITIONS

2. "Days" means calendar days, as opposed to working days. In computing any period of time under this Consent Decree, the calculation shall be determined pursuant to Federal Rule of Civil Procedure 6 (a) and (e), although the three-day period specified by Rule 6 (e) shall apply to materials dispatched by Federal Express, or another overnight delivery service.
3. "Submit" means to deposit in the U.S. Mail or dispatch via Federal Express or another overnight delivery service, postage pre-paid.

## IV. CIVIL PENALTY

4. Within 30 days of entry of this Consent Decree, Apache Nitrogen shall pay to the United States a civil penalty in the amount of FORTY THOUSAND DOLLARS (\$40,000). Apache Nitrogen shall pay the civil penalty by Electronic Funds Transfer to the U.S. Department of Justice account in accordance with current electronic fund transfer procedures, referencing DJ #90-11-3-1398 and this Consent Decree. The transfer instruction shall be provided to Apache Nitrogen by the United States Attorney's Office for the Northern District of California following lodging of this Consent Decree. Any payment received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. On the date that the transfer is made, evidence of the transfer shall be sent to the United States in accordance with Section VIII (Form of Notice) of this Consent Decree and to:

Office of the United States Attorney  
Northern District of California  
Financial Litigation Unit  
450 Golden Gate Avenue  
P.O. Box 36055  
San Francisco, California 94102.

5. Apache Nitrogen shall pay interest, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, for any delinquent payments of the civil penalty in Paragraph 4.
6. Apache Nitrogen shall not deduct the payments made under this Section in calculating its federal or state income taxes.

V. INJUNCTIVE RELIEF

7. Apache Nitrogen has installed a hydrogen peroxide control system ("H<sub>2</sub>O<sub>2</sub> System") to control NO<sub>x</sub> emissions during periods of startup and shutdown at its AOP-3 and AOP-4 plants. Under its current Title V Permit, Apache Nitrogen must comply with an operation and maintenance plan entitled the "AOP-3/-4 Absorption Tower Hydrogen Peroxide Injection Operation Procedures" ("H<sub>2</sub>O<sub>2</sub> System Procedures"). Apache Nitrogen has prepared and EPA has reviewed a supplemental operation and maintenance plan for proper operation of the H<sub>2</sub>O<sub>2</sub> System ("Supplemental H<sub>2</sub>O<sub>2</sub> Plan"). Apache Nitrogen shall comply with the following conditions in regard to its H<sub>2</sub>O<sub>2</sub> System Procedures and Supplemental H<sub>2</sub>O<sub>2</sub> Plan (collectively, the "H<sub>2</sub>O<sub>2</sub> Plans"):
  - a. *Compliance with H<sub>2</sub>O<sub>2</sub> Plans.* Apache Nitrogen shall fully comply with its H<sub>2</sub>O<sub>2</sub> System Procedures and Supplemental H<sub>2</sub>O<sub>2</sub> Plan at all times.
  - b. *Apache Nitrogen Requested Revisions to H<sub>2</sub>O<sub>2</sub> Plans.*
    - i. Apache Nitrogen must submit any proposed revisions to the H<sub>2</sub>O<sub>2</sub> System Procedures or Supplemental H<sub>2</sub>O<sub>2</sub> Plan to EPA for a 30 day review period.
    - ii. If EPA provides no comments to Apache Nitrogen during the 30 day review period, the proposed revisions will become part of the H<sub>2</sub>O<sub>2</sub> System Procedures or Supplemental H<sub>2</sub>O<sub>2</sub> Plan for purposes of Paragraph 1.a,

upon Apache Nitrogen's receipt of any approval required by the State of Arizona under the Title V permit.

- iii. If EPA identifies in writing to Apache Nitrogen deficiencies with the proposed revisions within the 30 day review period, the revisions will not become effective until Apache Nitrogen corrects the identified deficiencies and allows an additional fifteen 15 days for review by EPA. If EPA provides no further comments to Apache Nitrogen during this period, the revised H<sub>2</sub>O<sub>2</sub> System Procedures and/or Supplemental H<sub>2</sub>O<sub>2</sub> Plans will become the effective plan(s) for purposes of Paragraph 1.a, above after the end of the 15 day period, and upon Apache Nitrogen's receipt of any approval required by the State of Arizona under the Title V permit.
  - iv. If EPA provides further notice to Apache Nitrogen during the additional 15 day review period indicating that the deficiencies have not been corrected, the revised H<sub>2</sub>O<sub>2</sub> System Procedures and/or Supplemental H<sub>2</sub>O<sub>2</sub> Plans will not become effective. Apache Nitrogen must recommence the process set forth in Paragraph 1.b.i. for any proposed revisions.
  - c. *Training.* Apache Nitrogen must provide proper training to all employees involved in operating and maintaining the H<sub>2</sub>O<sub>2</sub> System regarding the requirements of the H<sub>2</sub>O<sub>2</sub> Plans.
  - d. *Access to H<sub>2</sub>O<sub>2</sub> Plans.* At all times, Apache Nitrogen must maintain copies of the H<sub>2</sub>O<sub>2</sub> Plans at its Facility in such a manner that they are readily available to employees involved in operating and maintaining the H<sub>2</sub>O<sub>2</sub> System.
8. *Additional Reporting.* For a period of 3 years after the effective date of the Consent Decree, as part of its NSPS quarterly excess emission reports, Apache Nitrogen shall:
- a. identify all periods of startup and shutdown of AOP-3 and AOP-4 during each reporting period. For each period of startup and shutdown identified pursuant to

- this Paragraph, Apache Nitrogen shall provide any CEMs monitoring data for NOx emissions collected pursuant to other applicable requirements; and
- b. identify all periods where a reduction in the volume of H<sub>2</sub>O<sub>2</sub> in the storage tank as measured by the tank level indicator shows a discrepancies of 10% or more as compared to the H<sub>2</sub>O<sub>2</sub> injected into the H<sub>2</sub>O<sub>2</sub> System as measured by the H<sub>2</sub>O<sub>2</sub> System flow controller. For each identified anomaly under this Subparagraph, Apache Nitrogen shall describe all corrective measures taken to address and correct the anomaly.
9. Apache Nitrogen shall include the requirements of Paragraph 7 of this Consent Decree in its Title V permit upon permit renewal for a period of 5 years after the effective date of the Consent Decree. At a minimum, in order to be in compliance with 40 C.F.R. § 60.11(d), Apache Nitrogen must maintain and comply with its H<sub>2</sub>O<sub>2</sub> Plans as an applicable requirement for Title V purposes. Such compliance with the H<sub>2</sub>O<sub>2</sub> Plans, however, does not necessarily guarantee full compliance with 40 C.F.R. § 60.11(d). As such, the United States reserves all rights to pursue any remedy available to it for violations of 40 C.F.R. § 60.11(d), notwithstanding the status of Apache Nitrogen's compliance with its H<sub>2</sub>O<sub>2</sub> Plans.

#### VI. STIPULATED PENALTIES

10. If Apache Nitrogen fails to pay the Monetary Payments required to be paid under Paragraph 4 of this Consent Decree, Apache Nitrogen shall pay a Stipulated Penalty of \$100 to Plaintiff per day for each day that the payment is late. Upon payment of a late penalty, interest, and any additional Stipulated Penalty under this Paragraph, in addition to the language required by Paragraph 4, all transmittal correspondence shall state that any such payment is for late payment of the Monetary Payments and Stipulated Penalties due under this Consent Decree.

11. The following Stipulated Penalties shall accrue per violation per day for each violation of the failure to comply of Apache Nitrogen to comply with its H<sub>2</sub>O<sub>2</sub> Plans (Paragraph 7.a):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500/day	1st through 14th day
\$1,000/day	15th through 30th day
\$1,500/day	31st day and beyond

12. The following Stipulated Penalties shall accrue per violation per day for each violation of the failure to comply with the reporting requirements of Paragraph 8:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$250/day	1st through 14th day
\$500/day	15th through 30th day
\$1,000/day	31st day and beyond

13. Stipulated Penalties under this Section shall begin to accrue on the day after performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Apache Nitrogen shall pay Stipulated Penalties within 14 days after receipt of demand by Plaintiff by cashier's check, made payable to "Treasurer, United States of America," and tendered to the United States Attorney, as provided in Paragraph 4, of this Consent Decree, unless the Dispute Resolution process of Section VII is invoked by Apache Nitrogen. If the Dispute Resolution provisions of Section VII are invoked, Stipulated Penalties shall continue to accrue as provided in this Paragraph, but need not be paid until one of the following:

- a. If the dispute is resolved by agreement or by a decision of the United States that is not appealed to the Court, Apache Nitrogen shall pay accrued Stipulated Penalties determined to be owing, together with interest, to the United States within 30 days



of the Effective Date of the agreement or the receipt of the United States' decision or order;

- b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Apache Nitrogen shall pay all accrued Stipulated Penalties determined by the Court to be owing, together with interest, within 60 days of receiving the Court's decision or order, except as provided in Subparagraph c, below;
- c. If any Party appeals the District Court's decision, Apache Nitrogen shall pay all accrued Stipulated Penalties determined to be owing, together with interest, within 15 days of receiving the final appellate court decision.

A transmittal letter summarizing the violation(s) for which the penalty payment is made shall accompany the payment and a copy of said letter and check shall be sent to the United States in accordance with Section VIII (Form of Notice).

- 14. Apache shall pay interest, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, for any delinquent payments of a Stipulated Penalty.
- 15. Payment of Stipulated Penalties under this Section shall not relieve Apache Nitrogen of any other liability for failure to comply with the requirements of this Consent Decree, or the Clean Air Act.
- 16. Plaintiff, in its unreviewable discretion, may reduce or decline to demand the Stipulated Penalties otherwise due under this Consent Decree.
- 17. These Stipulated Penalties shall not be the sole remedy the Plaintiff may seek for non-compliance with this Consent Decree. Such other remedies may include actions for contempt and/or to enforce this Consent Decree. Failure by the Plaintiff to give notice of either the violation of this Consent Decree or the assessment of Stipulated Penalties shall

not act as a waiver of Plaintiff's right to demand or assess or of Apache Nitrogen's obligation to pay said Stipulated Penalties.

## VII. DISPUTE RESOLUTION

18. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of Apache Nitrogen that have not been disputed in accordance with this Section.
19. Informal Dispute Resolution: Any dispute subject to dispute resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Apache Nitrogen sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, Apache Nitrogen invokes formal dispute resolution procedures as set forth below.
20. Formal Dispute Resolution: Apache Nitrogen shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not be limited to, any factual data, analysis,

or opinion supporting Apache Nitrogen's position and any supporting documentation relied upon by Apache Nitrogen.

21. The United States shall serve its Statement of Position within 45 days of receipt of Apache Nitrogen's Statement of Position. The United States' Statement of Position shall include, but may not be limited to, any factual data, analysis, or opinion supporting that position and all supporting document relied upon by the United States. The United States' Statement of Position shall be binding on Apache Nitrogen, unless Apache Nitrogen files a motion for judicial review of the dispute in accordance with the following Paragraph.
22. Apache Nitrogen may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section VIII (Forms of Notice) of this Consent Decree, a motion requesting judicial resolution of the dispute. The motion must be filed within 10 days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Apache Nitrogen's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.
23. The United States shall respond to Apache Nitrogen's motion within the time period provided in the Local Rules of this Court, unless the Parties stipulate otherwise. Apache Nitrogen may file a reply memorandum, to the extent permitted by the Local Rules or the Parties' stipulation, as applicable.

24. In any dispute under this Paragraph, Apache Nitrogen shall bear the burden of demonstrating that its position clearly complies with this Consent Decree and the CAA and its federal and State authorized or approved implementing regulations, and that Apache Nitrogen is entitled to relief under applicable law. Apache Nitrogen shall bear the burden of demonstrating that the decision of the United States is arbitrary and capricious or otherwise not in accordance with law.
25. The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Apache Nitrogen under this Consent Decree not directly in dispute. Stipulated Penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 13, above. If Apache Nitrogen does not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section VI (Stipulated Penalties).

#### VIII. FORM OF NOTICE

26. Written notifications, reports, or other communications submitted to the United States under the terms of this Consent Decree shall be deemed served on the date they are postmarked. Written communications submitted under this Consent Decree shall be addressed as follows, unless an entity listed below gives written notice that notices should be sent to a different address and/or person:

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Post Office Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
DJ 90-11-3-1398

Angela O'Connell  
Senior Counsel  
Environmental Enforcement Section  
U.S. Department of Justice  
301 Howard Street, Suite 870  
San Francisco, CA 94105  
DJ 90-11-3-1398

As to EPA:

Steve Frey  
Air Division  
U.S. Environmental Protection Agency  
Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Ivan Lieben  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105

As to Apache Nitrogen:

Robert E. Cashdollar  
Apache Nitrogen Products, Inc.  
P.O. Box 700  
1436 S. Apache Powder Road  
Benson, AZ 85602

#### IX. NOT A PERMIT

27. This Consent Decree is neither an air permit nor a modification of any existing air permit and shall not be interpreted to be such.

#### X. FAILURE OF COMPLIANCE

28. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that compliance with this Consent Decree will result in compliance with the Act or its air permit. Further, notwithstanding the United States' receipt, review, approval, or failure to approve of any plans, procedures, or studies prepared, or any consultants retained, pursuant to this Consent Decree, Apache Nitrogen alone shall remain responsible for compliance with the terms of the Act, this Consent Decree, its air permit and all applicable state and federal regulations, and shall not raise as a defense to any proceeding brought by the United States to enforce this Consent Decree any act or omission of the United States.

#### XI. NONWAIVER PROVISIONS

29. This Consent Decree in no way alters or relieves Apache Nitrogen's responsibility to comply with any and all other federal, state or local laws, regulations or permit conditions. Apache Nitrogen alone is responsible for achieving and maintaining compliance with all applicable federal and state laws, regulations and permits; compliance with this Consent Decree shall not be a defense to any actions commenced pursuant to such laws or regulations, except for those violations alleged in the Complaint resolved by this Consent Decree. Nothing contained in this Consent Decree shall be

construed to prevent or limit the United States' rights to obtain penalties or injunctive relief under the Act or other federal statutes or regulations.

30. The United States expressly reserve all remedies available to it for all violations of the Act, except for those violations alleged in the Complaint resolved by this Consent Decree, and all remedies available to enforce the provisions of this Consent Decree.

## XII. MISCELLANEOUS

31. The United States shall be deemed a judgment creditor for purposes of collection of any penalties under this Consent Decree.
32. This Consent Decree contains the entire agreement of the parties with respect to the subject matter hereof. Except as expressly provided otherwise, the terms of this Consent Decree may be modified only by a written agreement signed by both parties and approved by the Court as a modification of this Consent Decree.
33. Each party shall bear its own costs, attorney's fees and disbursements in this action. If, however, this Court determines that Apache Nitrogen has violated this Consent Decree, Apache Nitrogen shall be liable to the United States for all costs, expert fees and attorney's fees incurred by the United States in any action or proceeding against Apache Nitrogen for noncompliance with this Consent Decree.
34. The undersigned parties acknowledge and agree that the final approval by the United States and entry of this Consent Decree are subject to the requirements of 28 C.F.R. § 50.7, that provides for notice and an opportunity for public comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that the Consent Decree is

inappropriate, improper or inadequate. Apache Nitrogen shall not challenge the terms of this Consent Decree and consents to entry of this Consent Decree without further notice.

35. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the discretion of either party.
36. Apache Nitrogen shall identify on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of Apache Nitrogen with respect to all matters arising under or relating to this Consent Decree. Apache Nitrogen agrees to accept service by mail and waives the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

#### XIII. CONTINUING JURISDICTION OF THE COURT

37. The Court shall retain jurisdiction over both the subject matter of this Consent Decree and Apache Nitrogen in order to enforce the terms and conditions of this Consent Decree and to resolve disputes arising under the Consent Decree until the Consent Decree terminates.

#### XIV. TERMINATION

38. After the fifth anniversary of the entry of this Consent Decree, it shall be subject to termination. At any time after that date when Apache Nitrogen believes it has fulfilled all the requirements of this Consent Decree, Apache Nitrogen may so certify to EPA. If EPA agrees with Apache Nitrogen's certification, then the parties shall jointly file with the Court a stipulation of termination of this Consent Decree that shall terminate this Consent Decree without further action by the Court.



IT IS SO ORDERED:

UNITED STATES DISTRICT JUDGE

DATE

WE HEREBY CONSENT to the entry of this Consent Decree, subject to the public comment provisions at 28 C.F.R. § 50.7:

FOR THE UNITED STATES OF AMERICA:

---

BRUCE S. GELBER  
Chief  
Environmental Enforcement Section  
Environment & Natural Resources  
Division  
United States Department of Justice  
Washington, D.C. 20530

DATE: 8-23-04

---

ANGELA O'CONNELL  
Senior Counsel  
Environmental Enforcement Section  
Environment & Natural Resources  
Division  
United States Department of Justice  
301 Howard Street, Suite 1050  
San Francisco, California 94105

DATE: 8/26/04

FOR APACHE NITROGEN PRODUCTS, INC.

J. Stanton Curry, Esq.

GALLAGHER & KENNEDY, P.A.

Attorneys for Apache Nitrogen Products, Inc.

P.O. Box 700

1436 S. Apache Powder Road

Benson, AZ 85602

DATE: 5/25/04

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

---

WAYNE ~~N~~ASTRI  
Regional Administrator  
United States Environmental  
Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105

DATE: \_\_\_\_\_